

Freedom in America

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I am going to offer some sketchy suggestions as to how much and what sorts of freedom we in America have actually had or sought in the past, how the matter stands today, and what we intend or are likely to be able to do about it in the near future.

When we talk of freedom in this country I believe we usually have in mind (if I may be very elementary about it) all or some of such liberties as the following: (1) the right, and the actual opportunity, in some reasonable measure, to participate in the choice and control of important governing officials; (2) certain rights of acquiring, holding, and alienating property, entering into contracts, and choosing and quitting jobs; (3) rights not to be arrested or searched unreasonably, and not to be punished or held civilly liable except under the law and through an open, regular, and fair judicial procedure; (4) the right not to be compelled to contribute to the support of any church and the right to join any church, follow any sort of religious ritual; the right to hold any political, social, or economic opinions and to try to persuade others to accept them, by publishing the opinions and demonstrating in behalf of them—in mass meetings, parades, picket lines, etc.

We have never regarded any of these liberties as absolute. No one claims that every citizen has the right to vote; even the most conservative capitalist admits that there are valid limits on his property rights; there are offenses and disputes for which there is no right of jury trial, and there are conditions under which there can be no demand for a speedy and public trial; we compel even disbelievers to contribute to the support of religious services, such as those of chaplains in the army and navy, and in Congress; and we punish blasphemous,

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obscene, libellous, and seditious utterances. These limitations on freedom are taken for granted, ordinarily accepted without protest even by the most liberal-minded among us, as restraints necessary, even in the freest communities, for the maintenance of a decent, orderly, peaceable, and fair-dealing civic life. Even under such limitations we are left with a wide range of freedom, so that we say that we still have democracy, free enterprise, a free and fair judicial system, and religious freedom and freedom of the press and assembly. Often, however, there have been, even in this free country, restraints that have seemed, to many honest, public-spirited, and law-abiding citizens, to be unnecessary for the preservation of public order and fair dealing. We have a grand American tradition of equality and toleration; but we also have a tradition of discrimination and intolerance. Let us take a look briefly back on our history.

I.

Let us begin at the beginning. The first settlers of America came over under the impulsion of a desire to escape restraints of one sort or another. Most of the settlers in the Northern and Central colonies, and later in the South, were members of dissenting sects: Separatists, Puritans, Quakers, Presbyterians, Anabaptists, Seven-day Baptists, Dunkers, Moravians, Pietists. Many of these sects had arisen as adherents of a great new idea of spiritual freedom—of regeneration and salvation for the individual through an experience of his own inner spirit, uncontrolled by decisions or judgments of ecclesiastical officials above him; and they had new ideas on church organization and ritual. They were not being allowed to follow these ideas in their home countries. So they got permission to come to the New World, where they might worship, preach, and teach as they wished. In that sense then we can say that a search for freedom of religion was a dominant motive in the original settlement of our country. Settlers in all the colonies were also seeking economic freedom. Many of them had been

finding it hard to earn a living in England. John Winthrop, first Governor of Massachusetts Bay, who had been a country squire in England, wrote, just before he sailed for America, that "means are so shortened" that no man is "able to continue in that place and employment where he now iss," adding the paradoxical statement that "no man's estate will suffice to keepe sail with his 'equalls.' "

I doubt if it can be said that the settlers were in search of political democracy. They had had little experience with that sort of government at home and had not given much thought to the matter. When they drew up plans of government in America they generally fixed religious and property qualifications that excluded most adults, male or female, from political power. As to rights before the courts and law-enforcing officers, the record is not clear. But there were obstacles in the way of a "government of laws" in seventeenth-century America. In the first place, there were no lawyers. In the second place, judges, governors, preachers, and teachers had then, as now, confused and vacillating ideas as to what the law was that should govern instead of men. Sometimes they proclaimed the Bible as the supreme law, for civil life as well as the church. Sometimes they maintained that rules of the English common law prevailed here just as in England. Sometimes they asserted that the ultimate governance of law was to be found in a recognition of the force of universally binding rules of reason and justice—known, although not always obeyed, by all normally reasonable men. Occasionally colonial magistrates claimed the right to decide questions, even in criminal and civil litigation, according to their own ideas as to what was right.

It can hardly be said that economic life in America began with what we would call a system of free individual enterprise. The original settlements were made by groups, not by individuals. Colonial economic life began generally as a community enterprise and remained such, in many respects, for a long time. Thus in Massachusetts the original title to the lands on which

the colonists were to settle was invested in a company. The company later delegated the lands not to individuals but to groups—the towns. When the towns made allotments to individuals, they not only restricted the individual's right of alienation but also held on to considerable areas for common use. Moreover, both town authorities and the colonial legislatures intervened actively in economic life, regulating wages, prices, and other market practices, and carrying on directly various public economic and cultural enterprises. I fear the records show that the governments of Massachusetts Bay and some other colonies were what we now call "bureaucracies." Many of the earliest regulations and aids were soon abandoned; but many were long retained and at no time in the colonial period was there a widely prevalent belief that there was anything dangerous or impractical in a system of governmental control of economic affairs.

Indeed we cannot say that there was a prevalent aim to establish freedom of religion in colonial America. Those who came to be free to worship as they saw fit did not come in order to enable others to do the same. Most of the colonies, North and South, maintained churches supported by public taxation. In some of the colonies persons were fined, or whipped, or imprisoned, or mutilated, or banished, or even hanged, for openly advocating, in an orderly manner, unorthodox religious beliefs and practices.

This is not debunking our Puritan forefathers. Indeed, any contrary description of them would be debunking them, for it would be representing them as doing what they said they believed it was wrong to do. Winthrop said he considered democracy to be "the meanest and worst of all formes of Government . . . of least continuance and fullest of troubles," not ordained by God as fit "eyther for church or commonwealth." "God Almightye in his most holy and wise providence hath soe disposed of the Condicion of mankinde, as in all times some must be rich some poore, some highe and eminent in power

and dignitie; others meane and in subieccion." Queried John Cotton: "If the people be governors, who shall be governed?" These Puritan leaders preached the supreme necessity of authority, hierarchy, differentiation in function and rank. "Persons of differing endowments and qualifications," said Pastor William Hubbard, "need differing stations to be disposed into"; "the greatest part of mankind are but as tools and Instruments for others to work by, rather than any proper Agents to effect any thing of themselves." They regarded tolerance as a teaching of the devil. In a sense it may be said that Puritans and some others came to America to escape from a system of toleration. "I lived in a City," said Nathaniel Ward (author of the Massachusetts "Body of Liberties"), where a Papist Preached in one Church, a Lutheran in another, a Calvinist in a third; . . . the Religion of that place was but motly and meagre, their affections Leopard-like." "He that is willing to tolerate any Religion, or discrepant way of Religion, besides his owne, . . . either doubts of his owne, or is not sincere in it."

The Puritans were able, strong-willed, public-spirited men, honestly concerned with discharging a mission. They had, said one of them, "transported themselves, with their whole families and interests, into the desarts of America, that they might here peaceably erect Congregational Churches." Said another: "Necessity may presse some; Novelties draw on others; hopes of gaine in time to come may prevaile with a third sort; but that the most and most sincere and godly part have the advancement of the *Gospel* for their maine scope I am confident." If others did not accept the Gospel according to the Puritan interpretation, they could go somewhere else. Ward said he wanted to "proclaime to the world, in the name of our Colony, that all Familists, Antinomians, Anabaptists, and other Enthusiasts, shall have free Liberty to keep away from us, and such as will come to be gone as fast as they can, the sooner the better."

This, of course, is not the whole story of the origins of our civic traditions. Doubts of the validity of the Puritan authoritarianism appeared at times in the minds or hearts of even the most orthodox leaders. John Cotton, autocratic but benign, admitted that liberty, in moderate amounts, should be spread a little more widely. Governor Winthrop, one of the few non-clerics among the Puritan leaders, on several occasions protested against what seemed to him the clergy's too insatiable demands for conformity. And when, during his last illness, Deputy-Governor Dudley came to Winthrop's bedside, bearing an order to banish another heretic, the Governor refused to sign the order, saying that "he had done too much of that work already." More effective opposition came from those who had more positive and constant desires to create a free and tolerant society in America. Roger Williams, Puritan pastor at Salem, whom Cotton Mather later likened to "a certain windmill . . . whirling round with extraordinary violence," frankly attacked the Massachusetts system, contending that civil government had no rightful power to enforce religious conformity and that governors, in church or state, had no right to govern without consulting more freely the opinions of those whom they governed. Since the leaders feared that the whole country was "like to be set on fire" by the windmill, Williams had to move to another region. In "Providence Plantations" he made a genuine effort to establish a democratic constitution, separate church and state, and treat all persons alike, regardless of creed, rank, or race; and he wrote pamphlets setting forth his doctrine of freedom. "The *Soveraigne, originall, and foundation of civill power* lies in the *People* . . ." so that they "may erect and establish what *forme of Government* seemes to them most meete for their *civill condition*." Governments "have no more *power*, nor for no longer time, than the . . . people consenting and agreeing shall betrust them with." "God requireth not an *uniformity of Religion* to be *inacted* and *inforced* in any *civill* state; which inforced *uniformity* (sooner

or later) is the greatest occasion of *civill Warre*, *ravishing* of *conscience*, *persecution* of *Christ Jesus* in his servants, and of the *hypocrisie* and the destruction of millions of souls." A decade and a half later he looked back with pride on the main achievements of his experiment. "We have long drunk of the cup of as great liberties as any people we can hear of under the whole heaven . . . we have sitten quiet and dry from the streams of blood spilt by that war in our native Country."

The New World supplied an environment favorable to democracy. Residents of frontier towns, even in the most conservative colonies, made effective demands for political participation in the central governments. Those persons whose religious and political demands were too radical to be tolerated did not have to go back where they came from; there were other places to go in America. Almost everywhere there were determined minorities, and the growth of freedom in America soon got strongly under way. At the turn from the first to the second colonial century, there was John Wise, able and racy pastor at Ipswich, Massachusetts, of whom we have almost no records, except on the occasions when he was fighting in some liberal cause—for repeal of taxes levied without representation, for greater autonomy for the separate churches, for inoculation against smallpox, for a fairer currency system. Two pamphlets by him set forth as comprehensive and learned a defence of democracy and liberalism as we have ever had in America. He was leader in a remonstrance against the witchcraft prosecutions and later in a petition to the legislature to clear the names of those who had been convicted. Even Judge Sewall, who had played a leading part in the trying and sentencing to death of nineteen of the victims of those prosecutions, announced, five years later, that the whole matter had been preying on his mind and publicly made acknowledgment of his error. The legislature appointed a fast day in apology for the tragic events, and the twelve jurymen signed a statement asking forgiveness. It was about that time that Cotton Mather

wrote that "many judicious persons" had come to the conclusion that Roger Williams had had "the root of the matter in him."¹

II.

What has been our record since these divergent and uncertain yet generally valiant and idealistic beginnings? The story has continued to be confused. We have sometimes followed one tradition and sometimes another.

We held on to narrow suffrage qualifications until well into the nineteenth century. Most of the Southern states still, through one device or another, exclude most Negroes from voting; and there are other familiar limitations, legal and illegal, on political democracy.

Our record on economic freedom has been peculiarly mixed and blurred. Most of us have continued to profess our ardent faith in what we call a system of private enterprise and yet to show very little active concern over its progressive disappearance during the last century. I suppose it can fairly be said that early in our history we became a nation predominantly of individual owners of productive property and that that is a genuine system of private enterprise. Moreover, the notion that ownership of the properties upon which one works is an essential factor of genuine liberty and that government ought to protect and foster that sort of ownership, has been a familiar, often dominant, idea in our traditional political discussions. Our governmental policy has sometimes tended to fortify that sort of ownership. Sometimes it has had the opposite tendency. When Alexander Hamilton got in motion a policy of federal

¹ The colonial writings quoted in the foregoing paragraphs are as follows: John Winthrop, *A Modell of Christian Charity* (a lecture delivered aboard ship on the voyage to America in 1630), and *Life and Letters of John Winthrop*, by Robert C. Winthrop; John Cotton, *A Letter from Mr. Cotton to Lord Say and Seal in the Year 1636*; William Hubbard, *The Happiness of a People in the Wisdome of the Rulers Directing and in the Obedience of their Bretheren Attending* (1676); Nathaniel Ward, *The Simple Cobler of Aggawam* (1645); Cotton Mather, *Magnalia Christi Americana* (1702); Rev. John White, *Planter's Plea* (1630); Roger Williams, *The Bloudy Tenent of Persecution* (1644), and a "Letter to Lord Vane" (1654).

governmental aid and regulation to foster the development of large scale industry, commerce, and finance in this country, other political leaders opposed his policy because they believed that industrialization would transform the country from a nation of free property owners into a nation of economic dependents. Our actual economic development has been generally as Jefferson, Madison, and Taylor predicted. Familiar technological, social, and political changes have made it increasingly difficult for the individual enterpriser to survive in most fields of economic enterprise. Most of us today work, not on our own lands or with our own tools and materials, but with lands, materials, and instruments owned by others. We have become a nation mainly of employees and tenants rather than owners. If it is true, as many of our ancestors believed, that individual ownership of the productive property on which one works is essential to economic freedom, then we have lost that freedom, perhaps irrevocably.

How have we fared in our rights before the courts and in our spiritual and intellectual liberties? Some of our ablest intellectual leaders have urged us to pay more attention to an orderly, stable, rightly guided and disciplined community than to individual equality and freedom of inquiry. John Adams, Alexander Hamilton, Fisher Ames, Daniel Webster, Hugh Legaré, and many lesser men, have warned us against innovation, speculation, and a too lavish challenging of the decisions of our betters or superiors or even of a majority of our equals. "Government," said Ames, "does not subsist by making proselytes to sound reasons or by compromise and arbitration with its members; but by the power of the community compelling the obedience of individuals."²

We have frequently acted on such principles, sometimes with no very noble or public-spirited motive. Just seven years after we had adopted the First Amendment, forbidding Con-

² A Letter of "Lucius Junius Brutus" (1786), in *Works of Fisher Ames* (1854), vol. II, p. 95.

gress to make any law "abridging the freedom of speech, or of the press," Congress enacted the famous "Sedition Act" of 1798, punishing persons who combined to oppose or impede the operation of governmental measures, or who uttered or published false, scandalous, and malicious sentiments tending to bring the government or its officers into disrepute or to excite hatred of the people of the United States. The act was vigorously applied, and several opposition editors were jailed or heavily fined, even though they had advocated no violence in their vigorous criticism of governmental policy. There are many later manifestations of our capacity for intolerance: anti-foreign, anti-Catholic, anti-Semitic movements; discriminations against Negroes long after the abolition of slavery; court injunctions against picketing or propaganda in support of strikes; abusive enforcement of so-called "criminal-syndicalism" statutes; the Sacco-Vanzetti, Mooney, and Scottsboro cases; the Georgia, Jersey City, and other state and municipal interferences with freedom of assembly.

On the other hand, Jefferson, Channing, Parker, Emerson, and many others of our statesmen, philosophers, preachers, poets, and novelists have proclaimed a liberal and democratic faith; and our deeds have often squared with such professions. By the middle of the nineteenth century we had attained at least the forms of a democratic suffrage; and now at last we are beginning to rescue southern Negroes and "poor whites" from the poll-tax disqualifications. We are finally awakening to a realization that free individual enterprise has been disappearing from our economic system and we are trying to devise ways to restore some of it. We abolished all state-supported churches soon after the Revolution. The Sedition Act of 1798 aroused such defiant denunciation that it was soon repealed. Indeed the two most active agitators against the act (Jefferson and Madison) became our next two Presidents, and a third prominent protestor, Marshall, was our next Chief Justice. We have admitted millions of persons fleeing from political, religi-

ous, and racial discrimination and oppression in foreign lands. We have removed many of the restraints on labor organizations. Mooney and some of the Scottsboro boys have been freed. Private groups, such as the American Civil Liberties Union and the Ohio League for Constitutional Rights, have rendered valuable moral prodding and practical aid in behalf of civil rights. We have usually had a vigorous discussion of public affairs and free criticism of public officials. I believe that, with all the setbacks, our main trend has been in a liberal direction.

III.

Under what conditions, or in what sorts of times, are our rights before the courts and our freedom of speech, the press, and assembly most likely to be violated, by public authorities or by private individuals or groups, with the connivance of government? Three sorts of conditions are usually considered to be particularly unfavorable to the maintenance of civil rights: namely, those of war; of prolonged disputes between capital and labor; and of extensive governmental regulation of economic life.

War, it is said, creates conditions unfavorable to a sturdy respect for civil liberties. An inescapable obligation of a government is to keep a country safe from attack or defeat, and, to that end, to keep itself from destruction. In time of war these ends often appear to require a vigor, speed, and directness of action not normally required for the efficient discharge of peacetime duties of governments. So all governments, even the most democratic and liberal, usually suspend, for the duration of a war, some of the familiar judicial guarantees and the ordinary liberties of expression and association. War also seems to create an atmosphere generally favorable to the making of decisions on emotional rather than on rational grounds.

What has actually happened to our civil liberties when we have been at war? We have done some surprising things, both

in our tolerance and in our intolerance. Nothing happened to Daniel Webster when, while we were in the most critical period of the War of 1812, he denounced our government for having undertaken the war at all. Nothing happened to Abraham Lincoln when, as a representative in Congress, he denounced President Polk for having recklessly led us into the Mexican War.

What happened at the time of the Civil War, when Lincoln himself was deciding our policy? Several months before war began legally the President declared that he was faced by a movement "too powerful to be suppressed" by the ordinary processes of government, and he made it plain that he would not be restrained by the usual constitutional guarantees. Without statutory authority, he raised a volunteer army, added to the regular army, paid out unappropriated funds, excluded certain correspondence from the mails, proclaimed a blockade of southern ports, and suspended the writ of habeas corpus even in non-military regions. Said Lincoln, in 1864: "I felt that measures otherwise unconstitutional might become lawful by being indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it."³ Many worthy Americans today believe that Lincoln did more than any other man for freedom in America. Many of his contemporaries, even among those as strongly devoted as he was to the preservation of the Union and the abolition of slavery, called him a despot.

In the World War we prohibited the making of statements intended to cause insubordination or refusal of duty in our military and naval forces, or to obstruct recruiting and enlistment, the sale of liberty bonds, or the production of the necessities of war; prohibited the use of disloyal, profane, scurrilous, or abusive language about our military forces or our form of government, constitution, flag, or uniform, or any language intended to bring any of these into contempt, scorn, contumely,

³ From a letter to A. G. Hodges, April 4, 1864, in Nicolay and Hay, *Complete Works of Abraham Lincoln* (new and enlarged ed., 1905), vol. X, p. 66.

or disrepute; and authorized the Postmaster General to refuse mailing privileges to anyone he believed to be using the mails to violate the war acts. We imprisoned nearly a thousand persons under these acts and subjected others to the serious ignominy or inconvenience of indictment or arrest. We interned some 2,000 enemy aliens and arrested or searched a good many aliens and citizens without warrant.

Before we reach any thoroughly gloomy conclusions as to what happens to our freedom in time of war we should note some of the things that we did not do in our previous wars. We did not set up any general censorship of the press and we permitted widespread criticism of the conduct, and often also of the aims, of the wars. We had no general internment of enemy aliens during the World War; and persons accused of violations of the war statutes were tried before the regular courts and according to the regular judicial procedure; most of the persons accused were released on bail while awaiting trial or the outcome of appeals to higher courts, and some of them continued while out on bail to do the deeds for which they had been convicted or indicted. We had, in the last war, less freedom than we ought to have had; but we had more than the other belligerents allowed, and considerably more than the post-war dictatorships have allowed even in times of peace. It seems to me a careless exaggeration to say that war transforms our democracy into a dictatorship.

In times of bitter conflict between employers and workingmen, the attacks on freedom have come from both sides. Company guards have assaulted, kidnaped, and even slain strikers or unionizers; employers have until recently found it fairly easy to get court injunctions restraining peaceful agitation by strikers; city police have sometimes supported employers by violently handling the demonstrating workers (as in the Republic Steel Strike in South Chicago in 1937); municipal authorities (e.g. the Hague regime in Jersey City) have suppressed labor meetings. On the workers' side, the strikers have

used clubs and brickbats against strike-breakers, destroyed company property, carried on sit-down strikes, and engaged in other forms of workingmen's violence.

Finally, it is said that extensive governmental regulation and aid in economic affairs is almost certain to result in substantial governmental interference with civil liberties: if you curtail freedom of the market you curtail other forms of freedom; planning means coercion; a managed economy means a managed and censored opinion.

If that is so, then our future seems dark; for no important political group now has any plan for a substantial withdrawal from our present intervention. It is true that opposition platforms and speeches have continually, since the early days of the New Deal, condemned the "relentless expansion" of governmental power over the lives of farmers, industrial workers, and business men, and have demanded the re-establishment of "former liberties." Yet in 1936 the Republican party chose as its keynote speaker a Senator (Steiwer) who had voted for nearly all the major New Deal measures—the N.R.A., A.A.A., T.V.A., N.L.R.A., securities-and-exchange, farm-moratorium, railway-pension, and social-security acts. The Republican floor leader in the Senate (McNary) had voted for those measures and also for the utility-holding-company act; in 1940 he became the Republican candidate for Vice-President. In the second administration of the New Deal, the Republican leader in the Senate and the Republican floor leader and assistant floor leader in the House supported the liberalizing amendments to the social-security, war-risk-insurance, and farm-loan measures; and the two House leaders voted for the Wages and Hours Act. All the more prominent candidates for the Republican presidential nomination in 1940 warmly endorsed Federal aid for old age pensions and unemployment insurance, Federal restrictions on child labor, and further Federal aids to farmers. The 1940 convention of this party enthusiastically adopted a platform proposing the repeal of only two statutes (both relat-

ing to monetary matters), and then chose as its presidential nominee the candidate who had been most explicit in his approval of the New Deal measures. Leading Republican spokesmen have often said that the sweeping measures of economic regulation and aid had been maturing for a long time, chiefly under Republican auspices, and the New Deal just happened to come along at a lucky time. Thus, fortunately or unfortunately, we do not now appear to have a choice between one party supporting and another opposing an old American tradition (real or supposed) of narrowly limited governmental activity in economic affairs.

Can it be said that one way of applying the economic aids and restraints gives us collectivism and dictatorship, and another way maintains free enterprise and civil liberty? Yes, this has been said frequently and emphatically. The dispute thus becomes one not about the scope of the government's action but about the manner and mood in which it acts and the goal toward which it is moving, intentionally or unintentionally. Republicans and opposition Democrats have been saying or implying that, without putting in jeopardy the recently enacted program of reform, we still can choose between a policy which administers the reforms in faithful accord with principles of a government of laws and the maintenance of civil liberties, and a policy which, deliberately or carelessly, throws overboard these traditions of American freedom.

How genuine and realistic an issue can be made out of such claims? There have been two conspicuous forms of this sort of attack on the New Deal methods and manners. The New Dealers, it is said, have been so set on securing a speedy, unvarying, and unchallenged compliance with their pet ideas as to the specific ways in which their program must be carried out that they have created new types of governmental agencies and invested them with arbitrary powers of subsidiary legislation and adjudication; and by such methods as well as through their general manner of popular advocacy, they have spread

moods of intolerance and authoritarianism that threaten the destruction of ordinary rights of free speech and fair trials.

Obviously Congress had to create special agencies to carry out the new regulatory measures. Each measure has required a specialized knowledge and technique for its fair and effective administration; the new directions and restraints are not aimed at ordinary crimes or at criminally minded persons; and the task of the new agencies has been to devise and administer standards arrived at through continuous and expert investigation and supervision, often in co-operation with the parties to be controlled by those standards. Accordingly, Congress had to accord each agency a considerable range of discretion both in formulating rules and in making specific orders to secure observance of the rules. The complaint is that Congress adopted such broad and loose definitions of policy and made such sweeping grants of powers of rule-making and adjudication, that many of the new agencies have become independent legislative, executive, and administrative agencies, all in one. In many instances these bodies adopt their rules without public hearings, and make their specific orders and decisions, sustained by severe punitive sanctions, through a procedure lacking the safeguards of an ordinary judicial trial; and their decisions are not subject to review by the courts, except on grounds that a rule or order goes beyond the scope of functions delegated by the statutes, or that the decision is not supported by "substantial evidence."

The issue indicated here was vigorously but vaguely joined in the recent debates on the "Walter-Logan bill," defeated by the President's veto. This bill would have required the agencies to announce the rules under which they were to operate and to hold hearings before issuing rules and regulations "affecting the rights of persons and property"; established appeal boards within the agencies to hear claims by persons aggrieved by the decisions, acts, or failures to act by any of the agency officials; permitted any person to petition a Federal court to hear and decide whether a rule was in conflict with

the Constitution or statutes; directed the courts in such cases to render declaratory judgments holding the rules valid or invalid; and permitted parties aggrieved by a final decision of an agency to petition the court to set aside the decision on the grounds that the decision was issued without formal notice and hearing, or that the findings of fact were not supported by substantial evidence or were "clearly erroneous."

There are genuine differences of opinion between those who approve a main trend in legal administration during the last few decades and those who want to see that trend reversed. The latter believe that both the routines of fact-finding and the deliberations on rules, regulations, and special orders should follow the rigid, formal, slow, and costly procedures of ordinary legislative and judicial bodies. They believe that there are real dangers, both of oppression and of inefficiency, in the new and multifarious administrative definitions and rulings, often made without hearings and changed without notice. The former want to maintain simpler and less technical processes in order to provide what Chief Justice Hughes once described (when he was Governor of New York) as a "prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." The Walter-Logan Bill, its opponents believe, would (in the words of the Association of the Bar of the City of New York) force "administrative and departmental agencies having a wide variety of functions into a single mould which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process."

There have been grounds for skepticism concerning the genuineness of some of the statements of this issue; some of the leading advocates of bills to limit the New Deal agencies had previously shown strong opposition to any effective achievement of the ends the agencies were designed to achieve. I believe that moderates on the two sides are soon likely to come

to agree that a considerable range of discretion must be left to the administrative agencies in formulating rules and devising procedures for their enforcement, and yet that some new formal checks can be wisely put on arbitrary action by the agencies. There may be an increasing recognition of a need for the restraints; reliable evidences appear to show that higher and lower officials in some of the newer agencies have been hasty, prejudiced, or opinionated in their actions—perhaps habitually so in some instances. Most of the new administrators, however, appear to be acting with as much intelligent concern for the public interest and as much respect for public opinion as most Congressmen display, and with as much regard for lawful and impartial judgment as most of our judges display. The real safeguards against arbitrary and inefficient action here will probably have to be found, not in statutory restraints, but in the development of traditions of professional pride and judicial impartiality, generally comparable to the restraints upon which we mainly depend for protection against arbitrary and prejudiced action by the courts.

IV.

What are the prospects for our freedom in the very near future—as affected by our present governmental policies?

I have not reserved time for any discussion of the contentious issue as to whether our prevailing foreign policy is tending toward helping or harming the state of freedom, here in America. Still, I should take my stand—and it is on the “anti-isolationist” side, accepting the risk of our getting into the war. That simply seems to me to be a risk less horrific than the risk of a German victory. I do not like the expression “aid to Britain.” In the first place, I support an “interventionist” policy primarily as an aid to ourselves. In the second place, I should not care to aid a Britain I thought likely to renew the international policy of Sir John Simon, which was too much like that of Poincaré and Tardieu in France. That

has had the fateful impracticality of any non-idealistic policy. I believe the chances of preventing a long restoration of such a policy will be more favorable with Germany defeated than with Germany victorious.

If we go to war, there are certain conditions that may create, if not the necessity, a very insistent demand, for restrictions on individual liberty. Among the millions of naturalized German and Italian citizens, there may be a considerable number whose sympathies will lie with our enemies; we shall probably enter the war with stronger anti-war sentiments than we had in the last war; and we have had prolonged and bitter divisions over issues of both domestic and foreign policy. We are already partly prepared, wisely or unwisely, for imposing restraints. We have registered and finger-printed all aliens. The Federal Communications Commission has extensive powers of control over communications by wire or over the air. The Sedition Act of 1918 has been repealed but the mild Espionage Act of 1917 is still on the statute books. We have new Federal statutory provisions (in the Alien Registration Act of 1940) for the punishment of those who advocate or encourage the overthrow of our governments by force or violence or who knowingly affiliate with associations or assemblies advocating such action. Yet I believe we are fortunate in having now in the most important offices in Washington men who have shown themselves to be strongly predisposed against restraining civil liberties. The Attorney-General and the Solicitor-General have been emphatic in condemning the numerous proposals for arbitrary dealings with aliens and for censorship and espionage; and the Supreme Court, in its present personnel, seems likely to afford as strong a protection to civil rights as we have ever received from that tribunal.

We have been debating some questions here at home, arising from our nearness to the war in Europe: concerning rights of workers to strike in defense industries; rights of assembly and discussion to be allowed to organizations (such as the

German-American Bund) that oppose our democratic system; and rights of Senators, Congressmen, and other public speakers and writers to oppose the policy of the Administration. Merely to make the issues clear, I shall state summarily some views of my own on these questions.

I should not restrict the right of workers in defense industries to strike or picket peacefully, even by requiring a "cooling-off period" before striking. I should restrain strikers from employing violence against other workers or against the property of employers; and to the extent necessary to restrain such violence, I should afford police protection to workers seeking access to plants in order to take the places of strikers. Those who oppose police protection to prevent strikers' violence against *bona fide* job seekers are either going too far in their ideas on the extent to which the government must maintain strikers' rights, or not far enough. If strikers' claims to their jobs are unlimited enough to justify violence, or threats of violence, against workers who in good faith seek to replace them, then the government should remove all occasion for the violence by adopting explicitly the principle of a worker's property in his job and should directly prohibit employers from replacing strikers. Finally, I should allow employers to speak or publish their opinions in opposition to unions, when the expression of such opinions is not accompanied by explicit or implied threats of discharge or other forms of reprisal.

I see no reason why the "anti-democratic" groups should be suppressed or how we can consistently do so in the name of democracy and freedom. I agree with Solicitor-General Biddle that we shall not "defeat the Nazi evil by emulating its methods." I believe, however, that it would be no undemocratic abrogation of the rights of such groups to prohibit them from engaging in military drills or wearing uniforms or provocative insignia; or to require them to hold their financial and membership records open to governmental inspection; or to prohibit them from policing their own meetings and from

manhandling or otherwise using physical means of silencing dissenters at their meetings.

Finally, I see no reason why freedom to criticize the domestic or foreign policy of our government, either now or in war, should be suppressed. I see no sign that such freedom is now being curtailed. It is true that we engage in a considerable amount of irrelevant name-calling; and we should probably proceed better toward satisfactory conclusions if we had less of it. Generally the speakers and writers who protest most against the names they are called are the freest in applying bad names to others. Mr. Lindbergh, who has in 1941 been unfairly called a "copperhead," had in 1939 appealed to us to inquire into the "personal interests and . . . nationality" of speakers and writers who were advocating some modification of our neutrality; and in 1940 he had charged that those who advocated a policy opposed to his own were influenced by motives of "personal profit and foreign interest." Senator Wheeler, another object of an intemperate reprimand by the President, repeatedly calls his opponents "war-mongers," "American Tories," "Wall-Streeters," and "modern Judases." I do not know of any time in all our history when criticism from all quarters, directed against all sorts of officials, high and low, has been freer than now: If anyone feels restrained, I believe he has chiefly his own timidity or an abnormal sensitiveness to blame. A timid person had better not engage in public debate, even in a democracy. And surely no man can rightly consider himself a martyr to the cause of free speech simply because he may find that a majority of his fellow citizens, having heard what he has to say, hold on to opinions that differ from his opinions.

What of our future domestic policy, apart from the war? There are many who believe that the present program of economic reform does not go far enough—whether because of its failures—not approaching near enough to any of its main social objectives, or because of its successes—inducing demands

for going further in the same direction. There are proposals that we go on into a completer and more rapid and direct planning of production, consumption, and the distribution of wealth, and that in order to make the planning work we establish sweeping controls over banking, credit, and investment, nationalize some of the great natural monopolies, and make more thoroughgoing uses of taxation as a means of redistributing income. There are proposals that we turn the regulatory efforts of the government in another direction—aiming at the maintenance, or the restoration and promotion, of small private enterprise—sacrificing efficiency for the sake of the benefits and virtues we used to associate with a society of individual property-owners—a society we had been abandoning long before the New Deal; in fact, abandoning even before the great industrial and financial centralization of the Harding-Coolidge-Hoover decade. Finally, there are proposals that our objective should be a complex, eclectic, economic system, with the government adopting as its characteristic task the function of maintaining a dynamic balance between various types of ownership: small individually owned enterprises; giant private corporations, variously regulated by government; great public corporations, like the T.V.A.; and private co-operative enterprises, aided by the government. Any one of these three programs—wider collectivist planning, restoring small enterprises, or maintaining a balance among competing systems—would require governmental restraints and aids that go considerably beyond the program of the New Deal.

Let us now examine the contention mentioned above, that such extensive economic restraints and aids by government lead to suppressions of free speech and assembly and to abridgments of fair trials before the courts. This has been former President Hoover's favorite complaint against the recent legislation. "Intellectual and spiritual liberty," he says, "can be sustained only by economic liberty"; and, for proof, he and others point to the experiences of the European dictatorships and conclude that

our course must be the same. The actual record does not supply much evidence of the cause-and-effect relationship these critics envisage. The totalitarian regimes in Europe—Italy, Germany, Russia—did not follow governments that were over-zealous and over-active in relieving distress and removing inefficiency. They followed governments that had been conspicuously negligent in facing the need for vigorous action to eliminate widespread poverty, inequality, and insecurity. And our own experience seems to contradict Mr. Hoover's argument. I have time for only one sort of evidence, drawn from recent decisions of the Supreme Court, in cases arising out of complaints against state or local authorities alleged to be violating constitutional rights of a free press, free association, and fair trials. There have been over twenty such cases during the last six years. In only two of the cases have the decisions been against claims in behalf of private rights: in one of the cases, the Court unanimously upholding the authority of a state university to exclude a student because of his refusal to take compulsory military service; and in the other the Court, with Justice Stone dissenting, upholding the authority of a local school board to exclude children who had refused on religious grounds to salute the United States flag. In all the other cases the Court has sustained the claims of the complaining individual. Thus it has (in four cases) reversed convictions of Negroes where Negroes were excluded from grand or trial juries; and (in another case) reversed the conviction of a Negro who had been denied the right of counsel. It has (in three cases) reversed convictions secured by confessions obtained through third-degree methods. In one case it has nullified the barring of Negroes from party primaries and in another the denial of their admission to a state university law school. It has (in seven cases) reversed convictions for participating in the public meetings or distributing the literature of radical groups, or for distributing literature or holding meetings without permission of public authorities; and in another case it has nullified a state statute aimed

at the suppression of opposition newspapers. It has (in three cases) nullified efforts to prevent peaceful picketing. These decisions have been unanimous in over half the cases. The only dissenters in the other cases—that is, the only Justices who voted to sustain the governmental limitations on free speech or assembly, or fair trial—were those Justices (Van Devanter, Sutherland, Butler, and McReynolds) who had been the most hostile to economic regulation by government. The Justices most favorable to the regulation of economic life have been the ones most opposed to the encroachments on civil liberties. Thus our civil liberties appear to have been faring unusually well during a period of unusually active economic regulation and aid by government.⁴

I have not intended to close with a glamorous picture of our freedom in America today. Democracy is not a system that we can safely be complacent about. It is no halfway system—a “compromise” or “middle-way” between left and right “isms.” It is still a radical doctrine, whose achievement still demands the sort of courage and determination and adventuresomeness that brought our forefathers across the difficult Atlantic to this strange country. The course ahead seems especially difficult right now; and it is especially important.

⁴ The two cases decided adversely to claims of civil rights violated are *Hamilton v. Regents*, 293 U.S. 245 (1934) and *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

The recent cases sustaining civil rights are as follows. In 1935: *Norris v. Alabama* and *Patterson v. Alabama*, 294 U.S. 587 and 600. In 1936: *Grosjean v. Amer. Press Co.*, 297 U.S. 233; *Brown v. Miss.*, 297 U.S. 278. In 1937: *De Jonge v. Oregon*, 299 U.S. 353; *Herndon v. Lowry*, 301 U.S. 242; *Senn v. Tile Layers' Union*, 301 U.S. 468. In 1938: *Lovell v. Griffin*, 303 U.S. 444; *Johnson v. Zerbst*, *Warden*, 304 U.S. 458; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337. In 1939: *Pierre v. Louisiana*, 306 U.S. 354; *Kessler v. Strecker*, 307 U.S. 22; *Lane v. Wilson*, 307 U.S. 268; *Hague v. C.I.O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147. In 1940: *Chambers v. Fla.*, 309 U.S. 227; *Thornhill v. Ala.*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106; *Cantwell v. Conn.*, 310 U.S. 296; *White v. Texas*, 310 U.S. 530; *Smith v. Texas*, 311 U.S. 128.

I believe that most of us, anti-isolationists and anti-interventionists, recognize some sort of world significance in the fate of freedom in America. We cannot easily escape a feeling of our "ominous greatness, evil as well as good." In that sense the metaphor Whitman applied to us fifty years ago—"Ship of Democracy"—may now have a peculiar appropriateness:

Sail, sail thy best, ship of Democracy,
Of value is thy freight, 'tis not the Present only,
The Past is also stored in thee,
Thou holdest not the venture of thyself alone, not of the Western
continent alone,

• • •

With thee Time voyages in trust, the antecedent nations sink or
swim with thee,

• • •

Theirs, theirs as much as thine, the destination-port triumphant.⁵

⁵ From "Thou Mother with Thy Equal Brood," in *Leaves of Grass* ("complete" edition, Philadelphia, 1892, p. 348).